Supreme Court, U.S.
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No. 05-1516

IN THE

Supreme Court of the United States

EDWARD A. BLOTTEAUX, AN INDIVIDUAL,
PETITIONER

v.

QANTAS AIRWAYS LIMITED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF

STATEMENT OF ADDITIONAL FACTS

Since 2001, the International Air Transport Association ("IATA") has directed its members to give passengers warnings of Deep Vein Thrombosis ("DVT") risk, and instruct them in ways to avoid developing it during international flights. The Petitioner has testified that, contrary to this industry standard and the Respondent's own corporate policy to give warning information, no DVT warning was given to him during the course of his September 2002 flight.

ISSUE

Does an international carrier's failure to provide its passengers with an industry adopted warning of a risk of death or serious bodily injury associated with certain conditions of air travel, a risk known to the airline but not its passengers, and for which the airline developed but failed to follow procedures for actually providing passengers with such warnings, constitute an "accident" within the meaning of Article 17 of the Warsaw Convention.

OPPOSITION TO ARGUMENT OF QANTAS AIRLINES

I. THE *RODRIGUEZ* CASE IS NOT IDENTICAL TO THE PRESENT CASE

The claim in *Rodriguez v. Ansett Australia*, 383 F.3d 914 (9th Cir. 2004), arose out of an international flight that occurred in the year 2000. The air carrier's argument was that, at the time of that flight, the industry practice was **not** to warn about DVT risks. In the present case, the Respondent's own developed audio/video programs demonstrate that Qantas had a practice of showing the DVT warning videos on other flights. However, adoption of a program is not sufficient. The air carrier must show that they provided the warning in a way calculated to get to the passengers.

Further, the IATA's pronouncement in 2001 created an industry standard that the Respondent, as an IATA member, had to follow. Thus, the Respondent here diverged from an industry standard and practice by not getting the information to the passengers that its program was supposedly designed to accomplish, while in *Rodriguez*, no standard or practice actually existed. Liability, in turn, should not hinge on the mere availability of information, but instead on whether the safety information actually reached the Petitioner.

II. SUBMISSION OF PETITION ON SIMILAR GROUNDS DOES NOT BAR THE COURT FROM HEARING THE CASE

The Respondent fails to produce any authority for the proposition that Certiorari should be denied merely because the Court previously denied Certiorari in a

similar situation. The Question Presented to the Court, while similar in wording to the Questions Presented in *Rodriguez*, arises in a different context from *Rodriguez*. The incident in Rodriguez occurred, prior to the Respondent or the IATA developing standards requiring DVT warnings. The accident involving the Petitioner occurred after the Respondent and the IATA developed DVT warning requirements, in September 2002.

III. THE NINTH CIRCUIT DID NOT MAKE A FACTUAL DETERMINATION

The Respondent wrongfully assumes that the Ninth Circuit made a factual finding. Merely because Qantas had developed a program to provide DVT warnings, does not mean that the warning ever reached the Petitioner. The Ninth Circuit assumed that adoption of a program was sufficient to comply with the new IATA regulations, and did not consider whether the warning ever reached the Petitioner.

The Ninth Circuit did find that Qantas had video, audio and written materials concerning DVT, a fact that the Petitioner does not dispute. On the contrary, the Petitioner asserts that because Qantas had such materials on hand and did not show them, they diverged from their own, and industry, standard.

Meanwhile, the Ninth Circuit never addressed or inquired into whether the Petitioner was ever provided with the safety information. The mere availability of safety information, among pages of other text and variety of entertainment programs, does not guarantee that the information is dispersed and noted by the flying public, including the Petitioner.

The Ninth Circuit's conclusion that merely developing a program is sufficient to comply with the

standard does not meet the purpose of IATA's direction, as a matter of law. The IATA's goal is to get safety information to the passengers, not merely have airlines develop programs that are not effectively implemented. Thus, Qantas's development of the program does not in and of itself suffice to meet IATA's standards. It is unexpected and unusual for a carrier to develop a program to inform of the risk, but not implement it in a fashion calculated to get to passengers.

IV. PETITIONER'S POSITION IS CONSISTENT WITH THIS COURT'S DECISION IN *HUSAIN*, WHICH ITSELF IS NOT REQUIRED TO BE CONSISTENT WITH INTERNATIONAL LAW

The Court has disapproved the results of international DVT litigation opinions in *Deep Vein Thrombosis and Air Travel Group Litigation* [2003] EWCA Civ. 1005, 2003 WL 21353472 and *Qantas, Ltd. v. Povey* [2005] CA33 2005 WL 450709. This Court, in the *Husain* decision did not interpret the same issue in the treaty in accord to the judgment of the sister signatories. *Olympic Airways v. Husain*, 124 S.Ct. 1221,1230 (2004).

The Court has directly held that a failure to act on information in the carrier's possession that results in an injury is a compensable "accident." *Olympic Airways v. Husain* 124 S.Ct at 1229-30. The decision deliberately stepped away from the decisions of sister signatories, and confirmed "that there is often no distinction between action and inaction on the issue of ultimate liability." *Id.* at 1229. The Court reached this conclusion despite being made aware in the dissent that the decision did not give consideration to how the treaty partners resolved similar legal issues. *Id.* at 1230. The Court should continue to follow its own precedent in determining liability from an

Article 17 "accident."

CONCLUSION

This Court should issue the Writ for Certiorari to the Ninth Circuit Court of Appeals and correct the erroneous decision, in order to protect the safety of international air travelers and to resolve important conflicts between the decision below and the decisions of other Circuits as well as this Court.

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